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Alternative Dispute Resolution (ADR) System in Japan

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# A Study on the People's Mediation System in China: Compared With the Alternative Dispute Resolution (ADR) System in Japan

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## Abstract

In order to reduce pressure from a backlog of court cases and promote social harmony, Chinese government promulgated the *People's Mediation Law*. However, compared with the Japanese ADR (Alternative Dispute Resolution), the people's mediation system has some problems, for example, the professional level is not high, the legal and systematic mediation weakens functions of mediation and it is lack of the good connection between the people's mediation and the litigation. Therefore, the people's mediation system needs further improvement and perfection in the period of social transition.

**Key words:** The people's mediation in China; Japanese ADR; Professional level; Connection of mediation and litigation

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## INTRODUCTION

Under the long influence of the Confucian culture, oriental characters are labeled as “tolerance”, “gentleness” and “harmony”. The people “dislike litigation” in

China and Japan. Therefore, the way of mediation has an important function to solve disputes in China and Japan. However, with the deepening of judicial reform in China, the “Academism” reformers had thought that mediation had impacted on the rule of law and the trial, and mediation was the secondary justice, so mediation had been gradually ignored from the end of 1980’s. Mediation, known as the “oriental flower”, was withering in that period. However, the court system has been under heavy pressure of a backlog of cases since the appearance of the “litigation explosion” phenomenon, and the people’s mediation and other ADR mechanisms are paid attention to. There are 4 important regulations about the people’s Mediation system: *The Supreme People’s Court’s Several Provisions About Hearing Civil Cases Involving the People’s Mediation Agreements* (2002), *“Several Provisions about the People’s Mediation Work* (2002), *The Notice of General Office of the CPC Central Committee and the General Office of the State Council on Forwarding “The Suggestions of the Supreme People’s Court and the Ministry of Justice on Further Strengthening the People’s Mediation Work during the New Period”* (2002), and *The Suggestions of the Supreme People’s Court and the Ministry of Justice about Further Strengthening the People’s Mediation Work in the New Situation* (2007). After the 4 important regulations were promulgated, a large number of research results have emerged and these research results have various types. In April 2006, the Ministry of Justice held a legislative experts’ discussion meeting about *People’s Mediation Law* and the meeting formed *A Suggestion Draft of People’s Mediation Law Experts*. Finally, the *People’s Mediation Law* was officially promulgated in August 2010. However, in actual operation, compared with Japanese ADR and other dispute resolution mechanisms, the people’s mediation system has following shortcomings and difficulties.

## 1. THE PROFESSIONAL LEVEL IS NOT HIGH

In Japan, the *Civil Mediation Law* includes provisions for hazards mediation, homestead and building mediation, farming mediation, commercial mediation, mine disaster mediation, transportation mediation, etc.. Japanese are accustomed to establish special legislation for carrying out a professional mediation, such as *Small Farming Mediation Law*, *Commercial Mediation Law*, *Money and Debt Mediation Law*, *Family Mediation Law*, *Labor Dispute Mediation Law* and so on (note: These laws’ names may not be accurate), and these laws respectively have a unitary process for mediation in the tribunal. The composition of the Japanese mediation institutions is higher professional. Professional and administrative civil mediation organizations in Japan mainly are: the Labor Committee, the Hazards Regulation Committee, the Prefecture Hazards Review Committee, the Central Building Dispute Review Committee, the National Life Center, the Prefecture Consumer Life Center, etc. (note: These organization names may

not be accurate). For settling increasingly diversified disputes, this kind of dispute resolution institutions is still on the increase. The administrations and the governmental departments are often entrusted to solve disputes. According to provisions of Japan *Civil Mediation Law*, mediation is presided over by the mediation committee, usually consisting of a magistrate (as the mediation committee director) and more than 2 members who are selected from the citizens. The mediation committees have different members with different types of cases. Mediation committee members are entrusted by some nongovernmental people and a mediation committee is mainly selected from the following three types of people: they obtain the lawyer qualification and have the expertise and experience in solving civil and family disputes, such as lawyers, university teachers, etc.; professionals who have the ability to use their professional knowledge and the social experience to identify facts and propose solutions, such as company managers, real estate appraisers, architects, doctors, etc.; 40-70 years old people with a wealth of social experience, knowledge and good characters, such as retired legal workers, etc.. Mediation committee members may serve a term of 2 years and they may be reappointed. As the third party, mediation committee members mediate the involved parties in order to reach an agreement and solve the dispute.

Compared with the Japanese mediation professional level, in China, the mediators' background knowledge and professional skills can not meet the realistic need of mediation work. Nearly 40% of mediators do not have a high school degree and a lower percentage of people have legal professional background. The mediators' background knowledge and professional skills can not meet the realistic need of mediation work in China.

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## 2. THE DISADVANTAGES OF A LEGAL AND SYSTEMATIC MEDIATION

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As mentioned before, after a long time of discussion, the *People's Mediation Law* was officially promulgated in August, 2010. The legal and systematic mediation is beneficial to promote the legal status of people's mediation, overcome very strong ideological or moral trend in people's mediation and prevent the power's damage to the principles of people's mediation. However, a legal and systematic mediation way may weaken the original advantages of the people's mediation and it may not be conducive to the development of the people's mediation. The original people's mediation advantage is informal. Because of the informal character, it is convenient, flexible, and adaptable and it can make a specific treatment according to a specific situation. People's mediators often use the interpersonal relationship as resources in order to seek the cooperation of the parties, for example, people's mediators often say to the parties: "Give a convenience, please!" or "Support the

work, please!” A legal and systematic mediation way is difficult to take into account a specific situation and local dispute characters, thus it is losing flexibility.

Therefore, it can not solve all the problems to rely on the *People's Mediation Law*. The revival of the people's mediation does not depend on a legal and systematic mediation way but it depends on an appropriate balance between the people's mediation way and litigation, and other formal systems.

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### **3. MANDATORY FACTORS OF MEDIATION**

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Japanese civil mediation is attached to the court, and it is a kind of quasi-judicial dispute resolution method. Compared with a general mediation system, Japanese ADR is more mandatory. In the program design, it shows mandatory factors to some extent. A Japanese civil mediation process starts from an application, and it does not need to be based on the parties' wills. After one of the parties applies for mediation, the mediation committee decides whether to accept the application and the acceptance depends on whether the dispute is suitable for mediation. However, in China, the people's mediation committee is a mass organization of self-government and it does not have the administrative power and the judicial power. In the process of mediation, the people's mediation committee must abide by the principle of voluntariness. In a case, even a people's mediator actively gets in the dispute, he must also be based on the consent of both parties to start the mediation.

Therefore, the people's mediation system is an ADR form outside the court. The people's mediation commission is an independent dispute resolution organization and it has not been an attached relationship with the court. The judicial administrations are mainly responsible for the management of the people's mediation system. According to the regulations of the *People's Mediation Law*, the parties may request the court to confirm a people's mediation agreement and then the mediation agreement has a legal effect. However, compared with the Japanese civil mediation, the mandatory degree of the people's mediation is obviously weak.

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### **4. THE CONFUSION ABOUT THE CONNECTION MECHANISM OF MEDIATION AND LITIGATION**

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The connection mechanism of people's mediation and litigation not only includes the connection of people's mediation and litigation but also the link between the people's mediation and judicial mediation. The connection of people's mediation and litigation mainly refers to a court judicially confirms a people's mediation agreement according to the *People's Mediation Law*. The link between the people's mediation and judicial mediation refers to a court has the people's mediation offices which may establish the link between the people mediation and judicial mediation.

After receiving a case, the judge can guide the parties to choose the people's mediation organization to mediate. If the mediation is not successful and the case filing chamber decides to accept the case, then the case goes to the procedure. This way may facilitate a timely resolution of a dispute, but may also bring a question about the justice and legitimacy of the court. According to the provisions of the *Civil Litigation Law*, the people's court must make a decision whether accept a written complaint or an oral complaint within seven days after receiving the filing. In the current practice, the third road—"suspension to file" is taken. The "suspension to file" may delay a filing and may be contrary to the basic jurisprudence principle of "The court shall not reject a complaint". The delay of filing may cause the parties' concerns on the limitation of action.

In addition, although a court has the people's mediation offices, the offices mainly contact with the case filing chamber or the trial part of the court. However, the case filing chamber and the trial part belong to different departments and it will easily make a poor connection. At present, the people's mediation offices or professional people's mediators not only accept disputes referred by the court, but also a lot of work on the Judicial Bureau. This situation will affect the mediation work efficiency to a certain extent. In addition, a main function of the people's mediation offices still is a pretrial bypass, and functions of accepting entrusted mediation from the court or assisting the court mediation have not been developed well. The reason mainly is that the court has the mediation power and the court gives a case to the people's mediation that will increase the complexity and the effect also is difficult to get the court's or the parties' recognition.

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## CONCLUSION

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From a global perspective, people are widely exploring diversified dispute settlement mechanisms. In this sense, mediation is not a replacement, but becomes the leading solution way for various forms of disputes. In the period of social transition, disputes between people have an unprecedented surge and dispute cases are continuously backlogged in China. In this context, the *People's Mediation Law* is promulgated to ease the court proceedings. The people's mediation has characteristics of grassroots level, wide distribution, flexibility, convenience, amity, etc.. It plays a fundamental, unique and irreplaceable role in settling disputes and is an important method for preventing and reducing civil disputes, solving social conflicts and promoting social harmony, known as "the first defense line" of maintaining social stability. However, since the implementation of the *People's Mediation Law* in China, there are some problems, for example, the professional level of mediators and mediation institutions is not high, a legal and systematic mediation weakens functions of mediation and it is lack of good connection between the people's mediation and litigation. In contrast, the degree of specialization of Japanese

mediation committees is higher and the civil mediation program effectively uses the resources from the judicial authority in the system design. These advantages provide some references for the development of the people's mediation system in China.

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